

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

ELISA G.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO  
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Real Party in Interest.

F077586

(Super. Ct. Nos. 14CEJ300149-1,  
14CEJ300149-2, 14CEJ300149-3,  
14CEJ300149-4, 14CEJ300149-5,  
14CEJ300149-6)

**OPINION**

APPEAL from orders of the Superior Court of Fresno County. Gary Green,  
Commissioner.

Linda J. Conrad, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County  
Counsel, for Plaintiff and Respondent.

-ooOoo-

Elisa G. (mother) and Ricardo C. (father) are the parents of six children, now seven-year-old J.C., six-year-old Johnny C., five-year-old twins A.C. and R.C., four-year-old Isaiah C., and three-year-old G.C. In May 2017, a Welfare and Institutions Code section 366.26 permanency planning hearing (permanency hearing) was held in which the juvenile court issued an order terminating mother's and father's parental rights. The parents appealed. In January 2018,<sup>1</sup> this court filed an opinion which reversed the order terminating parental rights and remanded for the juvenile court to set a contested permanency hearing. (*In re J.C.* (Jan. 11, 2018, F075711) [nonpub. opn.] (*J.C.*)). Before the remittitur issued, the judicial officer whose decision was reversed on appeal set a contested permanency hearing in his department. On the day of the contested hearing, which was held after the remittitur issued, mother filed a motion to disqualify the judicial officer under Code of Civil Procedure section 170.6,<sup>2</sup> which was denied. Following the hearing, the judicial officer terminated parental rights.

Mother appeals, seeking review of the order denying the disqualification motion.<sup>3</sup> We elect to treat the appeal as a petition for writ of mandate and conclude the judicial officer erred in refusing to disqualify himself, thereby rendering any subsequent order issued by him null and void. Accordingly, we issue a peremptory writ of mandate directing the juvenile court to vacate its order denying the motion to disqualify and all subsequent orders, and to assign the matter to another judicial officer.

---

<sup>1</sup> Subsequent references to dates are to dates in the year 2018, unless otherwise stated.

<sup>2</sup> Undesignated statutory references are to the Code of Civil Procedure.

<sup>3</sup> Father has not appealed.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>4</sup>**

These dependency proceedings began in February 2016, when the Fresno County Department of Social Services (Department) received a referral that mother and G.C. tested positive for methamphetamine at G.C.'s birth. A prior dependency case involving the five older children was dismissed just four months before G.C.'s birth, in which mother was granted sole physical custody of the five children and joint legal custody with father.

The Department filed a petition alleging the children came within the provision of Welfare and Institutions Code section 300, subdivision (b), based on mother's substance abuse problem from which father failed to protect the children, and G.C. came within the provision of Welfare and Institutions Code section 300, subdivision (j), based on her siblings' prior neglect. The children were taken into protective custody and ordered detained. The children were separated into two homes, with the four oldest children placed together in one foster home, and the two youngest in the home of their paternal aunt and her partner.

At the May 2016 combined jurisdiction and disposition hearing, the juvenile court found the allegations of an amended petition true after the parents submitted on the reports, took dependency jurisdiction over the children, and removed them from parental custody. The juvenile court ordered reunification services for mother, while father was denied services. Mother was given twice weekly supervised visits, and father was given monthly supervised visits.

Mother did not participate in her reunification services and failed to maintain regular contact with the Department. At the December 2016 review hearing, the juvenile court terminated mother's reunification services, decreased her visits to once a month,

---

<sup>4</sup> On October 1, mother filed a request for judicial notice of the record in the prior appeal, case No. F075711. We deferred ruling on the request pending consideration of the appeal on the merits and now grant the request. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

and set a combined review and permanency hearing for April 4, 2017. The juvenile court noted that mother had not visited the children since October.

*The Department's Report for the First Permanency Hearing*

In a report prepared for the permanency hearing, the Department recommended adoption as the children's permanent plan and termination of parental rights. The children remained in their same placements and their foster parents, who the Department identified as prospective adoptive parents, wanted to adopt them.

Mother and father visited the children monthly following the six-month review hearing. They brought snacks for the children and hugged and kissed them. The parents played with the children, interacted with them "fairly well," and were very affectionate and nurturing. Mother responded to the children's needs and both parents comforted the children when they fell while playing. The parents constantly told the children they loved them.

The children were considered "generally adoptable" based on their ages (ranging from one to five), their good physical health, and their lack of any significant behavioral concerns that would prevent their adoption. The five older children had speech delays—the four oldest children were receiving speech therapy through their school district, while Isaiah C. was receiving services through Exceptional Parents Unlimited (EPU). The children's speech had improved since being placed with their prospective adoptive parents, and they were able to follow directions, dress themselves, and interact with others. The children enjoyed playing with each other and interacting with their prospective adoptive parents, although they sometimes had age-appropriate physical outbursts. While Isaiah C. was a Central Valley Regional Center (CVRC) client, his development was improving through EPU services. J.C. and R.C. had been referred to CVRC, but their eligibility had not been determined, while A.C. and Johnny C. were determined not to be eligible for CVRC services.

The children also were considered “specifically adoptable,” as they were placed with prospective adoptive parents who wanted to adopt them. The prospective adoptive parents had formed healthy parent-child relationships with the children and stated on numerous occasions that they loved them and wanted to adopt them. The children appeared comfortable and happy with the prospective adoptive parents and saw them as their primary caregivers who met their daily needs. The prospective adoptive parents were committed to adoption, and to maintaining and nurturing sibling relationships through frequent visits. The two sets of prospective adoptive parents had good relationships with each other and were willing to maintain sibling relationships.

The Department opined that due to the lack of visitation, there did not appear to be a parent-child relationship, and termination of parental rights would not be detrimental to the children. The children were well adjusted to their care providers and looked to them to meet their daily needs. The children were considered to be “very easygoing”; they loved to play, smile and laugh. The children needed a permanent parent-child relationship which adoption would provide.

#### *The 2017 Permanency Hearing*

Both parents were present at the April 4, 2017 permanency hearing. The juvenile court continued the hearing because the parties had not received the Department’s report until April 3, 2017, and set dates for updated discovery and filing a statement of contested issues. The juvenile court set May 4, 2017, for the continued permanency hearing and settlement conference, and ordered the parents to appear at the hearing.

Mother’s attorney filed an issue statement, which stated mother was requesting a contested hearing on the issues of the children’s adoptability, and the applicability of the beneficial parent-child and sibling relationship exceptions to adoption. Mother objected to the termination of parental rights and requested a permanent plan of either guardianship or long-term foster care.

On May 3, 2017, the Department provided the parties with an addendum report which addressed paternal grandmother's application for placement of the four older children. The Department recommended against placing the children with paternal grandmother, as it was concerned for the children's safety and it would be detrimental to the children if they were removed from their current care providers. The social worker opined it was in the children's best interest to be adopted and remain with their prospective adoptive parents.

The report also discussed the results of the Consortium for Children Permanency Planning Mediation. The children's biological family and prospective adoptive parents agreed the two sibling sets would have contact at least six times per year, and the visits would include paternal grandmother. The children's respective prospective adoptive parents encouraged and invited the children to celebrate important occasions such as birthdays, school functions, and sport activities; they developed the plan to maintain and support the sibling connection.

The parents were not present at the beginning of the May 4, 2017 settlement conference. The juvenile court<sup>5</sup> noted the Department had filed the addendum report the day before, and mother had set the contest. County counsel and the children's attorney both confirmed they were submitting on the reports. Father's attorney thought the matter should be continued, as the addendum report was filed the prior afternoon and the attorney wanted to review the report with father.

Mother's attorney requested a continuance so she could review the addendum report with mother and determine whether mother wanted to continue with the contest. The attorney attempted to contact mother on May 3, 2017, to discuss the hearing, but mother's phone was no longer in service. Paternal aunt indicated she spoke with both

---

<sup>5</sup> Commissioner Gary Green (the commissioner) presided over this hearing.

parents on May 3, 2017, who said they would be at the hearing. Since neither parent had a working telephone, no one knew why they were not there.

After county counsel confirmed the addendum report did not materially change anything, and both the Department and the children's attorney stated they were prepared to proceed, the juvenile court heard argument. The juvenile court acknowledged the addendum report was filed in the late afternoon on May 3, 2017, but noted the report was a "fairly brief" five pages. With respect to the parents' failure to appear, the court stated they were ordered to be there, and it had no assurance the parents would be able to attend the hearing if it were continued. Considering the children's interest for permanency and stability, it did not see any reason to further delay the matter.

The juvenile court then proceeded to make the findings and orders. The court stated it had reviewed the social worker's reports and mother's issue statement. The court considered mother's attorney's arguments on the issues raised in the statement and found they were insufficient to preclude going forward. The court found notice of the hearing had been given as required by law, clear and convincing evidence existed that the children were likely to be adopted, and adoption was the appropriate permanent plan. At that point, the juvenile court noted that mother and father had arrived and told them it was going to proceed. County counsel asked the court if it was going to go back over the orders; the court responded that it was going to continue.

After counsel and clients conferred, the juvenile court stated that it had waited until 9:30 a.m. to call the case at the request of mother's attorney and it could not "devote anymore time to this case, so the Court will go forward." The juvenile court made the remaining findings and orders, including termination of parental rights, and placement of the children for adoption. After advising the parents of their appellate rights, mother's attorney asked for a brief opportunity to state why mother was late, adding that mother "wanted this [c]ourt to know and to also indicate that it was her desire to have a contest in this matter." The court said it would give her "30 seconds." Mother's attorney

explained: “She said that the buses were running late and they unfortunately had not accommodated for that and so that is why they’re late, and as I stated before, they don’t have telephones, so they weren’t able to communicate that.”

### *The First Appeal*

Mother and father both appealed from the order terminating parental rights. Mother argued the juvenile court prejudicially erred when it denied her attorney’s request for a continuance of the permanency hearing, which deprived her of her due process right to a contested hearing on the issues of adoptability, and the beneficial parent-child and sibling relationship exceptions to adoption. In an opinion filed on January 11, this court agreed mother’s due process rights were violated, as the juvenile court effectively denied mother a contested hearing when it proceeded with its orders, despite mother’s late appearance at the hearing, without affording her the opportunity to at least make an offer of proof on the exceptions to adoption. The disposition stated: “We reverse the juvenile court’s adoptability finding and the orders terminating parental rights as to both parents. We remand for the juvenile court to set a contested [Welfare and Institutions Code] section 366.26 hearing to consider the issues of adoptability of the children and the applicability of the exceptions to adoption.” (*J.C., supra*, F075711, at p. 17.)

### *The Juvenile Court’s Actions Before the Remittitur Issued*

On January 19, eight days after our *J.C.* opinion was filed, the juvenile court, on its own motion, set a permanency hearing for February 15, in department 21, which is the commissioner’s department.<sup>6</sup> On February 9, the Department submitted an addendum report which provided an update on the children’s circumstances. The Department continued to recommend adoption as the children’s permanent plan. The children remained placed with their prospective adoptive parents, who wanted to adopt them. The

---

<sup>6</sup> The commissioner was the judicial officer who issued the order setting the February 15 hearing.

prospective adoptive parents for the two youngest children had an approved home study, while the prospective adoptive parents for the four older children were working to complete their home study.

The prospective adoptive parents had supervised at least three visits between the children and their parents since May 2017. The two sets of children visited each other at least quarterly and their prospective adoptive parents agreed it was in the children's best interest for the children to remain connected after the adoptions were finalized.

Six-year-old J.C., who was in first grade, was determined to be eligible for special education services under the qualifying criteria of speech or language impairment. He was receiving twice weekly speech therapy and services from a reading specialist. Five-year-old Johnny C. and the four-year-old twins were attending preschool, where they were receiving speech therapy. While Johnny C. exhibited some inappropriate behaviors at school, which were being addressed there, he consistently demonstrated responsive, engaged and happy interactions with his prospective adoptive parents. None of the four oldest children were CVRC clients. Three-year-old Isaiah C. had been diagnosed with autism and remained eligible for CVRC services. One-year-old G.C. was healthy and had no developmental problems.

At the February 15 hearing, the commissioner appointed attorneys for mother and father—attorney Katherine Fogarty of the Alternate Defense Office (ADO) was appointed to represent mother. The Department and the children's attorney submitted on the Department's addendum report and a previous status review report filed on October 19, 2017. Both mother and father requested a contested hearing. The commissioner set the following dates: (1) March 22, for updated discovery; (2) March 29, for statements of disputed issues and witnesses; (3) an April 5 settlement conference; and (4) two trial dates—the first on April 12, before the commissioner in department 21 if the matter was a short cause, and the second on May 1, in department 23 if it looked like the matter would be a long cause.

On March 13, this court issued the remittitur in *J.C.*

*The 2018 Permanency Hearing*

Mother filed her statement of contested issues on April 2. Mother stated she wished to challenge whether the children were likely to be adopted and whether it was detrimental to terminate parental rights under the beneficial parent-child and sibling relationship exceptions to adoption. Mother listed three witnesses—the social worker, herself and paternal grandmother. Father also filed a statement of contested issues, which raised the same issues and listed two witnesses—himself and the social worker.

At the April 5 settlement conference, attorney James Binion of the ADO appeared on mother's behalf. Both mother and father confirmed they intended to contest the Department's recommendation. Due to a court commitment, the commissioner vacated the April 12 trial date and reset it to April 26, in his department, and vacated the May 1 trial date in department 23.

On April 26, at 11:42 a.m., Fogarty filed a section 170.6 peremptory challenge on mother's behalf, which stated the following: "Katherine Fogarty of the Alternate Defense Office, declares that she is the attorney for [mother] in this matter. [The commissioner], the judicial officer to whom this trial is assigned is prejudiced against the party and/or her attorney, and/or the interest of the party so that [mother] cannot have a fair and impartial trial before this judicial officer. [¶] [The commissioner] acted as the trial judge in the prior proceeding that was reversed on appeal. [Mother] is the party who filed the appeal that resulted in the reversal of the final judgment. The remittitur was issued on March 13, 2018[,] and the matter was confirmed for a new trial on April 5, 2018. Therefore, this motion is being made within 60 days after the party or party's attorney had notice of final assignment." Fogarty signed the document, but not under penalty of perjury.

The commissioner considered mother's section 170.6 challenge at the outset of the permanency hearing held that afternoon. The commissioner made the following findings

concerning the course of the proceedings: (1) the parties knew as of January 19, that he would be the judicial officer for the permanency hearing, as, pursuant to dependency court policy, the case had been directly assigned to him by its terminal digit as early as April 2016, and the assignment was reconfirmed when the ex parte motion setting the February 15 hearing in his department was filed and served; (2) at the February 15 hearing, he set an April 5 settlement conference and April 12 trial in his department, and while he also set a “backup trial date” for May 1, in the event it was a long cause matter, the “primary trial date” was always contemplated to be in his department, with every indication it would be a short-cause trial; (3) on April 2, both mother’s and father’s attorneys filed statements of issues and witnesses addressed to him which contemplated a short-cause trial; (4) on April 5, he reset the trial date to April 26, and vacated the May 1 trial date in department 23, which confirmed the hearing was a short-cause matter to be heard in his department; (5) at 3:57 p.m. on April 25, mother’s attorney raised the issue of a peremptory challenge, but there was no indication the attorney complied with “local rule 6.3.2”;<sup>7</sup> and (6) mother’s attorney filed the peremptory challenge at 11:42 a.m. on April 26.

The commissioner first announced his tentative ruling. The commissioner found the motion was defective on its face, as there was no indication it was under penalty of perjury and no supporting affidavit was attached. The commissioner also found the motion was untimely, as the parties were notified of the assignment to him no later than January 19, or, at the very latest, by February 15, which were “the dates of the first hearings after the appellate proceedings when dates leading to and setting this trial were

---

<sup>7</sup> The Superior Court of Fresno County, Local Rules, rule 6.3.2. provides, in pertinent part: “Any challenge of a judicial officer hearing dependency matters in Juvenile Court, Dependency Division, pursuant to Code of Civil Procedure [section] 170[] et seq. shall be reported to the Administrative Presiding Judge of the Juvenile Dependency Court. The Administrative Presiding Judge of the Juvenile Dependency Court shall take whatever legal action is appropriate, including reassignment to another department if necessary.”

discussed and set.” Based on those dates, the 60-day period to file a peremptory challenge expired on either March 20, or April 16. The commissioner stated he could not “waive any defects and failure to abide by the statutory times,” but if he was convinced the peremptory challenge was valid, another commissioner was ready to hear the case.

Fogarty apologized for “any inaccuracy in the template” she used, as she did not frequently file peremptory challenges and she relied on templates she received from her colleagues. Fogarty explained that mother told the attorney who was present for the settlement conference, Binion, that she wanted a different judge, but Fogarty did not know what happened at the conference to precipitate her request. Fogarty admitted she was not aware until the day before that section 170.6, subdivision (a)(2) allowed the request of a different assignment if the same judicial officer who heard the case would be reassigned to the trial, and she made the peremptory challenge after reconfirming that was mother’s desire. Fogarty argued the trial setting and assignment to a judge did not occur until April 5, which was when mother became aware the commissioner would be the trial judge. After hearing from the other attorneys, the commissioner denied the peremptory challenge on the “main grounds” of untimeliness and the facial defect.<sup>8</sup> Mother was not served with written notice of entry of the court’s order denying the peremptory challenge.

The commissioner proceeded with the hearing. The social worker testified that both prospective adoptive parents had completed their home studies, they were committed to adopting the children, and the children were thriving under their care. The youngest two children acknowledged their older brothers as siblings and the children

---

<sup>8</sup> Fogarty asked the commissioner whether, with respect to the local rule, the court took fault with her failure to comply with the requirement that a peremptory challenge be reported to the administrative presiding judge of the dependency court. The commissioner responded that “it’s not a big deal,” but he “would be remiss if [he] didn’t mention a local rule and if [he] didn’t mention [non]compliance with it.” However, he did not “think it’s a big factor,” and it did not “tip the balance one way or the other. [He] mean[t], that rule is there for a reason, and if [Fogarty] compl[ies] with it, then [he wi]ll take back [his] comments.”

appeared to enjoy each other's company. The children identified mother and father as their parents; during visits they were affectionate with their parents, and mother and father both attended to the children's needs. The children, however, did not have any problem separating from either mother or father, although the oldest child would feel a "little down" when visits with father ended.

Mother and father each testified the children were excited to visit with them and had difficulty separating from them. Mother, however, did not believe the children would be harmed if they were unable to see her again, although she believed the children would miss her. Father believed the children had a close bond with him and each other, and it would be detrimental to terminate parental rights, as he would miss out on doing things with the children. The hearing was continued to May 3.

At the continued hearing, following oral argument by the attorneys, the commissioner determined the children were generally and specifically adoptable. The commissioner found the parents had not met their burden of proving the beneficial relationship exception to adoption, as there was no compelling reason that termination of parental rights would be detrimental to the children. The commissioner also found the parents failed to establish the sibling relationship exception because, while the children shared a bond, with the strongest bonds being between the four oldest children as one group and the two youngest children as a second group, the Department was committed to maintaining the bonds within each group. Moreover, the children were relatively young, they lacked a history of significant common experiences, the children would have contact after adoption, and there was no evidence of detriment based on the proposed adoption plan.

Based on these findings, the commissioner found the children were likely to be adopted, terminated parental rights, and ordered the children placed for adoption. Mother filed a timely notice of appeal on June 4.

## DISCUSSION

We begin with mother's contention that the juvenile court erred when it denied her disqualification motion because it is dispositive of this appeal.

As a threshold matter, we address the appealability of the denial of the disqualification motion. A claim that the trial court erred in striking a motion to disqualify is not cognizable on appeal; it may be reviewed *only* by a writ of mandate, which must be sought within 10 days after service to the parties of written notice of the entry of the court's order determining the question of disqualification. (§ 170.3, subd. (d); *People v. Panah* (2005) 35 Cal.4th 395, 444.)<sup>9</sup>

We have discretion, however, to construe the appeal as a petition for writ of mandate and thereby reach the merits. (See, e.g., *Olson v. Cory* (1983) 35 Cal.3d 390, 401 [in "unusual circumstances" reviewing court may treat the purported appeal as a petition for writ of mandate]; see also *A.M. v. Superior Court* (2015) 237 Cal.App.4th 506, 515; *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400, 404.) Mother asks us to exercise that discretion here because she was never served with written notice of the denial of her disqualification motion. For this reason, mother also asserts the appeal is timely, as the period for seeking review does not commence until service of written notice of entry of the court's order. (*D.M. v. Superior Court* (2011) 196 Cal.App.4th 879, 885–886.)

We will exercise our discretion to construe the present appeal as a writ petition. As mother points out, she was not served with written notice of the juvenile court's denial. Moreover, the record is adequate for purposes of writ review and the merits have

---

<sup>9</sup> Section 170.3, subdivision (d) states: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of [s]ection 1013."

been fully briefed. Significantly, the Department responded to mother's arguments concerning the denial of the disqualification motion on the merits and does not contend we should not treat the appeal as a writ or that it is untimely.

*Section 170.6 Disqualification Motions and the Standard of Review*

“Section 170.6 permits a party to obtain the disqualification of a judge for prejudice, based solely upon a sworn statement, without being required to establish prejudice as a matter of fact to the satisfaction of the court.” (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1032 (*Home Insurance*).)<sup>10</sup> Thus, “[w]hen a party timely files, in proper form, a motion to disqualify a judge based on this provision, the trial court is bound to accept the disqualification without further inquiry.” (*Home Insurance, supra*, at p. 1032.) “The judge immediately loses jurisdiction and all his subsequent orders and judgments are void.” (*People v. Whitfield* (1986) 183 Cal.App.3d 299, 303–304.)

This court has stated that we review an order granting or denying a peremptory challenge for an abuse of discretion, and “[a] trial court abuses its discretion when it erroneously denies a motion to disqualify a judge.” (*People v. Superior Court (Maloy)* (2001) 91 Cal.App.4th 391, 395; see also *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315 [a trial court abuses its discretion when it erroneously denies a disqualification motion as untimely].) “Other courts have observed that, ‘[i]n deciding a section 170.6 motion, the trial court has no discretion’ so it is ‘appropriate to review a decision granting or denying a peremptory challenge under section 170.6 as [a question]

---

<sup>10</sup> “As relevant to our discussion, section 170.6 provides that no superior court judge shall try any civil or criminal action involving a contested issue of law or fact when it is established that the judge is prejudiced against any party or attorney appearing in the action. (§ 170.6, subd. (a)(1).) Prejudice may be established by the party or attorney ‘by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath’ that the judge is prejudiced against the party or attorney ‘so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial’ before the judge. (§ 170.6, subd. (a)(2).)” (*Home Insurance, supra*, 34 Cal.4th at pp. 1031–1032.)

of law’ using the ‘nondeferential de novo standard.’ ” (*Swift v. Superior Court* (2009) 172 Cal.App.4th 878, 882, quoting *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363; see also *Jane Doe 8015 v. Superior Court* (2007) 148 Cal.App.4th 489, 493 [applying independent standard of review].) In *Swift* and *Jane Doe*, the appellate courts held the de novo standard of review is appropriate when the correctness of the court’s ruling on the peremptory challenge turns on the application of law to undisputed facts. (*Swift, supra*, at p. 882; *Jane Doe, supra*, at p. 493.)

While under these latter authorities the independent standard of review would be appropriate in the instant case, since the correctness of the disqualification order turns on the application of law to undisputed facts, we need not resolve the issue because we find error under either standard. To the extent we are called to interpret the statute, that is a question of law we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

*The Juvenile Court Erred in Denying the Disqualification Motion*

The commissioner denied the disqualification motion on the grounds it was untimely and defective in form. We begin with the timeliness of the motion. Section 170.6, subdivision (a)(2) provides “when the Court of Appeal remands a case to the superior court and the trial judge in the prior proceeding is assigned to conduct a new trial on the matter, the party who filed the appeal may file a motion to disqualify the judge within 60 days of the date the party or the party’s attorney ‘has been notified of the assignment.’ ” (*Ghaffarpour v. Superior Court* (2012) 202 Cal.App.4th 1463, 1466.)<sup>11</sup>

---

<sup>11</sup> Section 170.6, subdivision (a)(2) provides, in pertinent part: “A motion under this paragraph may be made following reversal on appeal of a trial court’s decision, or following reversal on appeal of a trial court’s final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. [T]he party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party’s attorney has been notified of the assignment.”

The issue in this case is when mother or her attorney was notified the permanency hearing had been assigned to the commissioner. The commissioner found the parties were notified of the assignment either on January 19, when he set the permanency hearing or, at the very latest, February 15, when the permanency hearing commenced, and therefore the motion to disqualify was untimely because it was made more than 60 days after the later date. Mother contends this was error. She reasons that she could not have been notified of the assignment until after the remittitur issued, as the commissioner lacked jurisdiction to set and hold the permanency hearing before then. Thus, in her view, the 60-day period began to run on April 5, when the April 26 short-cause hearing was set, and therefore her motion was timely. We agree.

“Generally the filing of a notice of appeal deprives the trial court of jurisdiction of the cause and vests jurisdiction with the appellate court until the reviewing court issues a remittitur.” (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499 (*Anna S.*)) Under section 916, “an appeal stays further proceedings in the trial court regarding matters embraced in or affected by the judgment or order from which the appeal is taken.” (*In re Brandy R.* (2007) 150 Cal.App.4th 607, 609.)

This rule is subject to certain statutory exceptions, one of which is contained in section 917.7,<sup>12</sup> which “concerns an appeal from an order that awards, changes or otherwise affects the custody of a dependent child. During the pendency of such an appeal, the trial court retains jurisdiction to make subsequent findings and orders during the pendency of the child’s dependency case. [Citations.] Thus, the trial court retains the authority and duty to make orders in accordance with the California dependency scheme while the reviewing court considers the issues raised on appeal.” (*Anna S.*, *supra*,

---

<sup>12</sup> Section 917.7 provides in pertinent part: “The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child ... in an action filed under the Juvenile Court Law ....”

180 Cal.App.4th at p. 1499.) For example, the juvenile court, in its discretion and subject to all statutory prerequisites, may terminate its jurisdiction and issue an exit order determining custody and visitation while an appeal from an order issued following a disposition hearing is pending. (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 39.)

On appeal, “[t]he reviewing court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. [Citation.] The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned.” (*Anna S.*, *supra*, 180 Cal.App.4th at p. 1499.) “Until the remittitur issues, the trial court cannot act upon the reviewing court’s decision. [Citations.] The remittitur is not issued until the appellate opinion is final for all purposes. [Citation.] The issuance of remittitur is the act by which the reviewing court transfers jurisdiction to the court reviewed. [Citation.] When the remittitur issues, the jurisdiction of the reviewing court terminates and the jurisdiction of the trial court reattaches.” (*Anna S.*, *supra*, at p. 1500.)

Here, on January 19, the commissioner set a permanency hearing in an attempt to effectuate this court’s disposition in our January 11 opinion. The juvenile court, however, was without jurisdiction to act on this court’s nonfinal opinion until the remittitur issued on March 13. Therefore, the commissioner’s January 19 order setting the permanency hearing for February 15, and the February 15 order setting the short-cause trial for April 12 in department 21 and long-cause trial for May 1 in department 23, are null and void. (Cf. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 197.) Moreover, since the juvenile court did not have jurisdiction to assign the case to the commissioner until the remittitur issued on March 13, the time within which to bring a motion to disqualify under section 170.6 could not begin to run until after that date. The first time mother or her attorney was notified the permanency hearing had been

assigned to the commissioner after March 13, was at the April 5 settlement conference. The peremptory challenge therefore was timely, as it was filed less than 60 days later.

The Department contends section 917.7 gave the juvenile court the authority to act before the remittitur issued. The Department argues the juvenile court did not conduct the permanency hearing until after the remittitur issued and setting a new contested permanency hearing “was well within [the juvenile court’s] authority and complied with the Legislature’s mandate to avoid unnecessary delays in providing minors with permanency,” as expressed in *In re Marilyn H.* (1993) 5 Cal.4th 295, 305.

The juvenile court, however, may not effectuate an appellate court’s decision before it is final.<sup>13</sup> An appellate decision in a dependency case is not final until 30 days after the decision is filed. (Cal. Rules of Court, rules 8.260(b)(1), 8.470.)<sup>14</sup> On petition of a party or on its own motion, an appellate court may order rehearing of any decision that is not final in that court. (Rule 8.268(a)(1).) An order granting rehearing vacates the original decision and any opinion filed in the matter, and sets the cause at large in the Court of Appeal. (Rule 8.268(d).) Even after a decision becomes final as to the Court of Appeal, the court still must issue a remittitur in the matter (rule 8.272(a)), and the remittitur cannot issue until the time for our Supreme Court to grant or deny review has run. (Rule 8.272(b).) As we have stated, the trial court cannot act on the reviewing court’s decision until the remittitur issues. (*Anna S.*, *supra*, 180 Cal.App.4th at p. 1499.) Here, the commissioner set the permanency hearing in direct response to this court’s nonfinal decision and even began the hearing before the decision was final.<sup>15</sup> The commissioner, however, did not have jurisdiction to do so.

---

<sup>13</sup> As the court stated in *Anna S.*: “We know of no rule, statute or precedent that exempts dependency proceedings from generally applicable appellate rules governing disposition and finality.” (*Anna S.*, *supra*, 180 Cal.App.4th at p. 1501.)

<sup>14</sup> All further rule references are to the California Rules of Court unless otherwise stated.

<sup>15</sup> At the February 15 hearing, the commissioner stated “[w]e are here on instruction to address a contested selection and imp[lemen]tation hearing.” After the Department submitted on

The Department also contends the juvenile court merely acted in excess of its jurisdiction, therefore mother is estopped from raising the issue because she consented to jurisdiction by failing to object at the February 15 hearing. An appeal, however, divests the trial court of subject matter jurisdiction; “ ‘even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and [] an order based upon such consent would be a nullity.’ ” (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472–1473, citing *In re Lukasik* (1951) 108 Cal.App.2d 438, 443; see also 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 13, p. 585 [subject matter jurisdiction “cannot be conferred by consent, waiver, or estoppel”]).<sup>16</sup>

Since the juvenile court lacked subject matter jurisdiction when it set and held the permanency hearing, mother is not estopped from arguing her disqualification motion was timely because the time to file the motion did not begin to run until she learned of the assignment to the commissioner following issuance of the remittitur.<sup>17</sup>

---

its reports, the commissioner continued the hearing in progress to two separate hearing dates depending on whether it would be a short-cause or long-cause matter.

<sup>16</sup> The cases the Department relies on are distinguishable, as they involved instances where the court had jurisdiction over the subject matter but acted in excess of that jurisdiction. (See, e.g., *In re Griffin* (1967) 67 Cal.2d 343, 347, 348–349 [petitioner estopped from challenging trial court’s grant of continuance of probation revocation hearing to a time beyond the end of the probationary term, as the court acted in excess of jurisdiction]; *People v. National Automobile & Casualty Ins. Co.* (2000) 82 Cal.App.4th 120, 125–127 [surety estopped from challenging orders extending the appearance period beyond statutory period, as such orders were in excess of jurisdiction]; *California Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 260 [while subject matter jurisdiction may not be conferred by consent, a contention that the court acted in excess of its jurisdiction is subject to the doctrines of waiver and estoppel].)

<sup>17</sup> At oral argument on the disqualification motion, the commissioner found the remittitur was a “non-fact.” The court cited *Ghaffarpour* for the proposition that the time to file a peremptory challenge “begins when the party who filed the appeal has been notified of the assignment, and does not begin from the date of issuance of the remittitur by the Court of Appeal.” (*Ghaffarpour v. Superior Court, supra*, 202 Cal.App.4th at p. 1471, fn. omitted.) While we agree with this statement, *Ghaffarpour* did not address the issue presented here, namely whether the 60-day period for making the motion may commence based on an assignment that was made *before* issuance of the remittitur. The remittitur is significant here because the juvenile court did not have jurisdiction to make an assignment for purposes of holding a contested permanency hearing until the remittitur issued.

The commissioner also based the denial of the disqualification motion on the fact that it was not supported by an affidavit or declaration under penalty of perjury. Section 170.6, subdivision (a)(2) allows a motion to disqualify a court commissioner under section 170.6 to be made by either an oral or written motion supported by “affidavit or declaration under penalty of perjury,” or “an oral statement under oath, that the ... court commissioner ... to whom it is assigned, is prejudiced against any party or attorney, or the interest of any party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial ... hearing before the ... court commissioner ....”<sup>18</sup> (§ 170.6, subd. (a)(2).)

The failure to comply with the oath requirement, however, is a curable defect. (See, e.g., *People v. Whitfield*, *supra*, 183 Cal.App.3d at p. 304; *Retes v. Superior Court* (1981) 122 Cal.App.3d 799, 807.) Here, the written motion contained the appropriate language, but it was not signed under penalty of perjury. As mother asserts, “it would have been a simple matter for counsel to provide ‘an oral statement under oath’ when the motion was being considered by the juvenile court.” The Department does not contend otherwise.<sup>19</sup>

---

<sup>18</sup> We reject mother’s contention that a disqualification motion made after reversal on appeal need not be made by an oral or written motion supported by an affidavit or declaration under penalty of perjury, or an oral statement under oath. Although the second paragraph of section 170.6, subdivision (a)(2) contains the provision concerning a peremptory challenge following an appeal, it does not repeat the oath requirement that is contained in the first paragraph of section 170.6, subdivision (a)(2). The second paragraph does state that “the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion *under this section* regardless of whether that party or side has previously done so.” (§ 170.6, subd. (a)(2), *italics added*.) Making a motion under section 170.6 necessarily includes complying with the requirements set forth in the first paragraph of section 170.6, subdivision (a)(2).

<sup>19</sup> Although not a ground for denying the motion, the commissioner found mother’s attorney failed to comply with the Superior Court of Fresno County, Local Rules, rule 6.3.2. As mother points out, the rule requires that any challenge be “reported” to the administrative presiding judge, but does not state when the challenge must be reported or by whom. It appears the rule requires the court clerk or whoever receives the challenge to report it to the

In sum, mother's disqualification motion was properly made. Therefore, the commissioner was required to disqualify himself from presiding over the permanency hearing. His failure to do so means the orders he made at that hearing, including the termination of parental rights, are null and void, and must be vacated.

**DISPOSITION**

The appeal from the May 3, 2018 orders terminating parental rights and placing the children for adoption is deemed to be a petition for writ of mandate. Let a peremptory writ of mandate issue commanding the juvenile court to vacate the orders denying the motion to disqualify and terminating parental rights, and to assign the matter to a judge other than Commissioner Gary Green for a new Welfare and Institutions Code section 366.26 hearing. In the interests of justice, this opinion is made final immediately on filing as to this court. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

\_\_\_\_\_  
HILL, P.J.

WE CONCUR:

\_\_\_\_\_  
LEVY, J.

\_\_\_\_\_  
PEÑA, J.

---

administrative presiding judge. Mother's attorney certainly cannot be faulted for failing to report the challenge.